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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS.

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December 27, 1950.

INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Statutes involved	2
Statement of the case	2
Argument	11
I. The Court of Appeals has supported the public policy underlying Section 5 of the Clayton Act	11
II. Section 5 of the Clayton Act does not authorize use of the criminal judgment as evidence that the conspiracy of which respondents were convicted occasioned Emich Motors' cancellation	14
A. Section 5 of the Clayton Act authorizes use of the prior judgment only to the extent that estoppel by judgment would apply in a subsequent suit between the same parties	14
B. The judgment in the criminal case could not have constituted a determination that plaintiffs' franchises were canceled pursuant to the conspiracy	15
(a) The opinion in United States v. General Motors Corporation, 121 F. 2d 376, did not determine any facts	15
(b) Estoppel cannot arise from the evidence in the criminal case	17
(c) The general verdict did not constitute a finding against defendants of all the allegations of the indictment	17

(d) Due to the unique character of the indictment and instructions in the criminal case, nothing there determined was relevant to plaintiffs' suit 19
(e) The ruling of the Court of Appeals is not in conflict with Local 167 v. United States, 291 U. S. 293..... 24
(f) The ruling of the Court of Appeals is not inconsistent with Bigelow v. R. K. O. Pictures, 162 F. 2d 520..... 27

III. The Court of Appeals was correct in finding error in the use of the indictment..... 28
A. It was error to submit the indictment to the jury 28
B. The Court of Appeals did not misinterpret the trial court's instructions regarding the indictment..... 31
C. The criminal judgment was not evidence of the existence of all the matters charged in the indictment..... 32

IV. Under the doctrine of res judicata, and independent of Section 5, respondents are not estopped from denying the conspiracy or its supposed impact upon petitioners..... 32

Table of Cases Cited.

Aetna Life Insurance Co. v. Ward, 140 U. S. 76..... 16
Bauer v. Watkins, 171 F. 2d 492..... 22
Bigelow v. R. K. O. Pictures, 162 F. 2d 520..... 27
Bond v. Brown, 53 U. S. 253..... 16
Buckeye Powder Co. v. DuPont Powder Co., 248 U. S. 55 14
Burlen v. Shannon, 99 Mass. 200.....17, 23
Chesavoir v. United States, 32 F. (2d) 945.....17, 18
De Sollar v. Hanscome, 158 U. S. 216.....17, 23
Duncan v. Atchison, T. & S. F. R. Co., 72 Fed. 808.... 16
Emich v. General Motors Corporation, 181 F. 2d 70.... 1
Everett v. Everett, 215 U. S. 203..... 18
The Evergreens v. Nunan, 141 F. 2d 927..... 22
Gay, Sullivan & Co. v. Glaser, Crandell Co., 102 F. 2d 149 16
Hornbuckle v. Stafford, 111 U. S. 389..... 31
Licata v. State, 81 Fla. 649, 88 So. 621..... 17
Local 167 v. United States, 291 U. S. 293.....24, 26, 27
Massey v. United States, 281 Fed. 293.....17, 18
McCann v. New York Stock Exchange, 107 F. 2d 908. 16
Packet Co. v. Sickles, 72 U. S. 580..... 23
The People v. C. & E. I. Ry. Co., 336 Ill. 506.....16, 18
The People v. Wyanet Light Co., 306 Ill. 377..... 18
Ralston Purina Co. v. Novak, 111 F. (2d) 631..... 16
Rhoads v. City of Metropolis, 144 Ill. 580..... 18
Russell v. Place, 94 U. S. 606.....17, 23
Standard Oil Co. v. Clark, 163 F. 2d 917..... 22
Statler v. United States, 157 U. S. 277..... 18

Town of Flora v. Indiana Service Corporation, 222 Ind. 253, 53 N. E. (2d) 161 ..... 17, 23

Travelers Ins. Co. v. Comr. of Internal Revenue, 161 F. 2d 93 22

United States v. Five Cases, etc., 156 F. 2d 493 22

United States v. General Motors Corporation—
26 F. Supp. 353 ..... 3, 19
121 F. (2d) 376 ..... 4, 15

OTHER CITATIONS.

30 Am. Jur. (Judgments), Sec. 275, p. 994 29

2 Black on Judgments (2d ed.), Sec. 631 29

Congressional Record, Vol. 51—
Page 9491 11
Pages 13849-13858 11
Page 13851 ..... 15, 35
Page 13853 ..... 11, 15, 34
Page 13901 33
Page 15826 11
Page 16149 35

2 Freeman on Judgments, Sec. 767 29

Restatement of the Law—Judgments, Sec. 68 22

United States Code—
Title 15, Sec. 15 (38 Stat. 731) (Sec. 4 of Clayton Act) 2
Title 15, Sec. 15 (38 Stat. 731) (Sec. 5 of Clayton Act) 2, 6, 11
Title 28, Sec. 1254(1) (62 Stat. 928) (Judicial Code) 1

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Court of Appeals (R. 9448) is reported in 181 F. 2d 70. No opinion was filed by the District Court in which the case was tried.

JURISDICTION.

The petition for certiorari was granted in limited form on October 9, 1950. Jurisdiction rests on the provision of the judicial code which confers upon this Court discretion to review by writ of certiorari "any civil or criminal case, before or after rendition of judgment or decree" (U. S. C., Tit. 28, Sec. 1254, par. 1; 62 Stat. 928).

STATUTES INVOLVED.

Section 4 of the Clayton Act (38 Stat. 731, U. S. C., Tit. 15, Sec. 15).

Section 5 of the Clayton Act (38 Stat. 731, U. S. C., Tit. 15, Sec. 16).

STATEMENT OF THE CASE.

The grant of certiorari is limited to "the question whether the Court of Appeals erred in construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

The Criminal Case.

The indictment in the criminal case was returned in the District Court of the United States for the Northern District of Indiana, South Bend Division, at the February Term, A. D. 1938 (R. 13).

Paragraph 34 of the indictment contains the charge. It alleges (R. 21):

> "* * * defendants and other persons and corporations to the Grand Jurors unknown, unlawfully have engaged in a conspiracy in restraint of the aforesaid trade and commerce among the several States in Cadillac, LaSalle, Buick, Oldsmobile, Pontiac and Chevrolet automobiles; and, the defendants have conspired to do all acts and things, and to use all means neces-

sary and appropriate to make said restraint effective, including the means, acts, and things hereinafter more particularly alleged, and other means, acts, and things to the Grand Jurors unknown."

On demurrer the court read into the accusatory paragraph the succeeding paragraphs 37 to 62 of the indictment. *United States v. General Motors Corporation*, 26 F. Supp. 353, 355. These paragraphs charged that defendants had conspired:

37. To require dealers to use GMAC* as a condition to obtaining a franchise (R. 21).

38. To require dealers to promise to use no finance company but GMAC as a condition to obtaining a franchise (R. 21).

39. To make franchises for one year in order to be able to terminate them in cases where dealers failed to use GMAC (R. 21).

40. To threaten to cancel franchises of dealers who failed to use GMAC (R. 22).

41. To cancel franchises of dealers who failed to use GMAC (R. 22).

42. To refuse to ship cars to dealers who did not use GMAC (R. 22).

43. To refuse to ship cars to dealers who used a finance company other than GMAC (R. 22).

44. To examine dealers' books to procure information relevant to financing by companies other than GMAC (R. 22).

45. To compel dealers to permit the examination of books referred to in paragraph 44, *supra* (R. 22).

46. To compel dealers to disclose use of finance companies other than GMAC (R. 22).

47. To procure information regarding use of finance companies other than GMAC from employees of dealers (R. 23).

48. To require dealers to justify use of other finance companies (R. 23).

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* In this brief General Motors Acceptance Corporation will be abbreviated as GMAC.

49. To compel dealers to refrain from using other finance companies by any other means (R. 23).

50. To give special privileges to dealers using GMAC (R. 23).

51. To delay car deliveries to dealers using other finance companies (R. 23).

52. To discriminate against dealers using other finance companies with respect to number, model, color and style of cars, time of delivery and manner, form and time of payment (R. 23).

53. To give GMAC places, offices and quarters in the factories and to deny the same to other finance companies (R. 23-24).

54. To give GMAC information as to cars delivered to dealers and to refuse the same to other finance companies (R. 24).

55. To give GMAC contracts as security and to refuse the same to other finance companies (R. 24).

56. To transfer title to cars directly to GMAC as security and to refuse the same to other finance companies (R. 24).

57. To enforce onerous payment terms to other finance companies and dealers using them (R. 24).

58. To advertise and require dealers to advertise GMAC (R. 24).

59. To require dealers not to advertise other finance companies (R. 24).

60. To pay dealers a rebate for financing through GMAC (R. 25).

61. To advertise and require dealers to represent that no rebates were paid (R. 25).

62. To conceal and require the dealers to conceal the payment of rebates (R. 25).

To support the charges the government relied in part on the inferential testimony of approximately fifty dealers regarding their experiences and in part upon direct evidence: *United States* v. *General Motors Corporation*, 121 F. (2d) 376, 402. Fred Emich was one of the dealers who testified for the government (Cr. R. 293).

The *quantum* of proof varied with respect to the different terms. As to some of them there was a sharp conflict in the evidence (*e. g.*, the alleged agreement to cancel and withhold cars) and as to others there was a total lack of any proof (*e. g.*, there was no proof to support the charge in paragraph 39 regarding one-year contracts or in paragraph 47 regarding commercial bribery or to show any conspiracy involving Cadillac or its dealers).

Confronted with the construction of the indictment made on demurrer and with the variation in the proof, the trial court instructed the jury as follows:

> "And so in this case, when you come to consider the question of conspiracy to restrict interstate commerce unduly and unreasonably, it is your duty to inquire from all of the evidence and to determine from all of the evidence whether there was any contract, any agreement, any undertaking, tacit or otherwise, whereby these parties entered into acts and did acts which inevitably led to an undue restriction of interstate commerce." (R. 8535.)
>
> "Nor is it necessary for the Government to prove all of the acts alleged. It is essential that they prove this conspiracy, and if you believe that the evidence is sufficient to sustain that conclusion, then you have a right to find that there is a conspiracy, but it is not essential to that conclusion that each and every one of the acts charged in the indictment shall be proved." (R. 8536.)

No forms of special verdict were given the jury. They brought in a general verdict acquitting all individual defendants (including all defendants that Emich had sought to incriminate) and finding the corporations (General Motors Corporation, GMAC, and General Motors Sales Corporation) guilty (R. 8553).

Use of Criminal Case in Civil Suit.

In a pre-trial argument in the instant case, plaintiffs contended that the judgment was admissible in evidence as *prima facie* evidence of all the charges in the indictment, while defendants contended that since the only conspiracy relevant to plaintiffs' case was one to withhold cars or cancel dealers* and since the criminal jury may have disbelieved all of Emich's testimony and may have found a conspiracy not involving these terms, the judgment was inadmissible for any purpose. The trial court ruled that the judgment was admissible (R. 114):

> "* * * as *prima facie* evidence of a violation by defendants of the antitrust laws of the United States."

On the trial plaintiffs offered the entire criminal record (R. 422), to which defendants objected (R. 423-424). Counsel for plaintiffs then contended, contrary to their position here (Petn., pp. 21-23), that Section 5 of the Clayton Act incorporated the doctrine of estoppel by judgment. Witness the following colloquy in connection with plaintiffs' offer of the record in the South Bend case:

> "Mr. Stickler (counsel for plaintiffs): Your Honor, this question, as we view it, arises under Title 15, U. S. C. A., Section 16 (Section 5 of the Clayton Act) * * *
>
> "First, it is the final judgment which is the matter establishing the *prima facie* evidence and, secondly, in determining what the final judgment creates *prima facie* proof of, you have to determine under rules applicable to the principles of estoppel by judgment what is behind that judgment." (R. 424.)

Plaintiffs also agreed, again contrary to their position here (Petn., pp. 16-19), that it was for the judge to de-

* All of plaintiffs' alleged damages flowed from the withholding of cars or cancellation of plaintiff's franchises. (R. 10-11.)

termine the scope of the estoppel. Thus plaintiffs' counsel stated:

> "We do not say that the scope of estoppel is a question of fact for the jury (R. 433).
>
> • • • • •
>
> "I think it is the function of the court to look at the record and determine what the issues were that were decided [in the criminal case]." (R. 439.)

The trial court admitted the indictment and judgment, stating (R. 443):

> "The court has considered this offer, and it seems clear to the court that all that was intended by Section 16, Title 15 U. S. C. A., was that plaintiffs in cases of this nature were to be accorded the advantage of establishing a *prima facie* case of conspiracy to violate the antitrust laws by merely introducing the judgment of conviction in the criminal case. The nature of the evidence upon which that judgment rests is wholly immaterial and irrelevant. The court does not interpret this section to mean that the rules governing the admissibility of evidence have been relaxed or modified so as to permit the reading of the record of testimony of witnesses who testified in the criminal case in which action neither the parties nor the issues were the same.
>
> "What issues were determined by the judgment of conviction are questions of law to be decided by the court and not issues of fact to be decided by the jury in this case.
>
> "The record in the criminal case, other than the pleadings which are now in evidence, is inadmissible except for the limited purpose of enlightening the court in properly instructing the jury as to the legal effect and weight to be given the evidence of conviction in the criminal case."

With respect to the criminal case, counsel for plaintiffs told the jury that defendants (R. 235) were found to be and were adjudged guilty on November 17, 1939, of all the

matters and things charged in said indictment in South Bend.

That the indictment was before the jury as proof of the commission of every act alleged in the indictment was reiterated many times and reemphasized in final argument (R. 7073):

> "All the unreasonable restraints on the dealers have clearly been established here by the direct testimony of the dealer witnesses, and proof of the conviction of these defendants by the government in the South Bend indictment and trial on those exact charges."

And in closing summation counsel for plaintiffs accounted to the jury for failure to adduce evidence on various points by saying

> "As I pointed out before, the indictment was enough, or the conviction was enough." (R. 7378.)

The trial court refused to give instructions that the judgment was not evidence that any dealers had in fact been cancelled or that any particular act charged in the indictment had in fact been committed against plaintiffs or any particular person. See rejected instructions No. 13 (R. 9018) and No. 14 (R. 9019). Instead it intensified the prejudicial effect of the admission of the indictment and the arguments of plaintiffs' counsel by directing the jury that it might regard the judgment as evidence that every act charged in the indictment had been committed, and also that plaintiffs' franchises were cancelled pursuant to the conspiracy, stating (Instruction No. 12, R. 9101-9102) that for plaintiffs to recover they must prove by a preponderance of the evidence

> "* * * *including the criminal judgment* that the defendants entered into a conspiracy * * * and that the franchise of Emich Motors Corporation was cancelled

by reason of and pursuant to said conspiracy and not because of the things alleged by defendants as the reasons for such cancellation." (Italics ours.)

This instruction in terms gave effect to the judgment and the indictment as evidence in favor of plaintiffs on every issue in the case except the amount of damages.

Rulings of Court of Appeals With Respect to Misuse of Criminal Record in Trial Court.

The Court of Appeals held (R. 9454-9455):

> "* * * plaintiffs were entitled to rely upon it as prima facie evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the movement of those cars. * * * And we think the judgment is available at least for the limited purpose of establishing that there had been a violation of public rights in the absence of which plaintiffs would have no cause of action under the statute, and from which violation they assert their injury stemmed. * * *
>
> "While we are convinced that the trial judge announced the proper principles for determining the applicability of the criminal judgment, we think he did not conform to or correctly follow his own ruling."

The Court of Appeals found that the trial court had gone further than its own announced principles and had (1) sent the indictment to the jury as an exhibit without any limitation as to its use (R. 326-327, 7446-7447); and (2) permitted argument by plaintiffs' counsel that the judgment and indictment were proof of all matters therein alleged; and (3) instructed the jury that the judgment and indictment were not only evidence of a violation by defendants of the antitrust laws, but also (a) evidence of a conspiracy to cancel Chevrolet dealers, and (b) evidence

that plaintiff's dealerships were cancelled pursuant to the conspiracy (Instruction 12, R. 9101-9102; 7440).

With respect to the use made of the indictment, the Court of Appeals stated (R. 9455):

> "* * * we are convinced that serious error was committed in permitting the jury to consider the indictment itself as evidence in the case. And that was certainly the effect of its use as an exhibit. It told the jury that it could look to it to ascertain the *means* and the *acts* committed in furtherance of the conspiracy of which defendants had been convicted. But we have shown that since it was unnecessary for the Government to prove the performance of any of the acts or means, except for the purpose of establishing venue, in order for the jury in the criminal proceeding to find defendants guilty, it was for the court to examine the indictment as an aid in determining or defining the issues presented by the earlier case, and it should not have been introduced as an item of evidence in the proceeding here involved."

The Court of Appeals further found that the error was not cured but in fact aggravated by instructions allowing the jury to consider the judgment not only as evidence of a conspiracy but also as evidence that plaintiff's franchises were cancelled pursuant to the conspiracy, thus giving it evidentiary value far beyond its meaning, in the light of the character of the indictment and the instructions to the jury in the South Bend case (R. 9455-9456).

ARGUMENT.

I.

THE COURT OF APPEALS HAS SUPPORTED THE PUBLIC POLICY UNDERLYING SECTION 5 OF THE CLAYTON ACT.

Rather than nullifying the public policy of Section 5 of the Clayton Act, the ruling of the Court of Appeals has, if anything, extended that policy.

There is no question but that President Wilson wished private individuals to have the benefit of "facts which the Government has proved." 51 Cong. Rec., p. 15826; Br. for Petnrs., p. 13. Nor is there any question regarding a similar intent by Congress.* That the Court of Appeals also construed Section 5 of the Clayton Act as embodying such a purpose is shown by its statement (R. 9453):

"And under § 5 of the Clayton Act, parties suing

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* The dispute in Congress was not over the desirability of this purpose but was rather over the *extent* of the benefit. President Wilson wanted the prior judgment to be given a *conclusive* effect, whereas the majority of Congress decided that it should be given only a *prima facie* effect. 51 Cong. Rec. 13849-13858. Illustrative of the discussion during the debates which culminated in the adoption of Section 5 of the Clayton Act are the following:

Senator Chilton (51 Cong. Rec. 13853): "But, Mr. President, in our zeal to do something for the people and to get legislation which has 'teeth in it' we must remember that every person under the Constitution of the United States has rights. One of the fundamental rights of every person and every corporation in the United States is that he must have a day in court, and he must have his day in court on his case and on his facts."

Congressman Green (51 Cong. Rec. 9491): "I have some doubt as to whether it will be of very much benefit to the private individual in any event. He can always avail himself of the search which the Government has made in order to obtain the evidence. He can use, presumably, and obtain the same evidence which the Government has used, even though the decree be not made conclusive in his favor."

> for redress of injuries resulting from violation of the antitrust laws may utilize a previous proceeding to the same extent as could the parties thereto."

This is but another way of saying that private litigants may use the judgment to support any proposition that was proved or determined in the Government suit.

It was the application of this principle to the peculiarities of the criminal case that concerned the Court of Appeals, even as it had the trial court (R. 7060-7061). After the above quotation, the opinion of the Court of Appeals continues (R. 9453):

> "However, it remains a matter for the court to determine the scope and applicability of the previous judgment, as it did in the New York case (*Local 167* v. *United States,* 291 U. S. 293), and certainly it could not rightly be held here that the judgment convicting the corporate defendants and acquitting all the individual defendants through whom the corporations must have acted, operated as an estoppel not only as to the fact of the existence of the conspiracy but also as to *all* the means and acts charged in the indictment, as plaintiffs would have us hold."

This is followed by a consideration of the contention of defendants* and an analysis of the criminal case, subsequent to which the court concludes (R. 9454):

> "We are convinced that the meaning defendants seek to give to the judgment is too limited, and that plaintiffs were entitled to rely upon it as prima facie evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the movement of those cars."

Inasmuch as plaintiffs considered the existence of such a conspiracy to be one of the main issues in their case

* That the judgment was not evidence on any issue in the private suit. (Br. for appellants in Court of Appeals, pp. 80-96.)

(R. 227, 424-430), it can hardly be said that permitting the judgment to be used as prima facie evidence on this issue is of no benefit to plaintiffs or frustrates the purpose of Congress in enacting Section 5 of the Clayton Act.

While the Brief for Petitioners vacillates somewhat in its discussion of what plaintiffs' theory is as to the policy behind this section of the Clayton Act, plaintiffs seem to be taking the alternative positions that the judgment is prima facie evidence of every matter

1. As to which the Government offered evidence,

or

2. As to every matter determined in that case.

We have no quarrel with the second alternative. Both the trial court and Court of Appeals assumed that construction of the statute and devoted their attention to deciding what had been determined in the Government suit. However, as to the first alternative we take decided exception.

There is nothing in the statute to support such a construction, nor is there in the congressional debates. Indeed the quotation of Senator Walsh used in plaintiffs' brief (Br. for Petnrs., p. 14) expressly observes that the section "makes the judgment simply prima facie evidence of the facts *therein determined*." (Italics supplied.) As between the Government and defendants the judgment could not be used to support some proposition on which the Government had offered evidence but which had not there been determined, and *a fortiori* it should not be so used in a private suit.

II.

SECTION 5 OF THE CLAYTON ACT DOES NOT AUTHORIZE USE OF THE CRIMINAL JUDGMENT AS EVIDENCE THAT THE CONSPIRACY OF WHICH RESPONDENTS WERE CONVICTED OCCASIONED EMICH MOTORS' CANCELLATION.

A. Section 5 of the Clayton Act Authorizes Use of the Prior Judgment Only to the Extent That Estoppel by Judgment Would Apply in a Subsequent Suit Between the Same Parties.

This is a statutory exception to the common law rule that a judgment in one case cannot be used in any manner in a second suit between different parties regardless of whether the second suit involves the same transaction. *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U. S. 55. The statute states a special rule of evidence, that a prior criminal judgment in an antitrust suit may be offered by the plaintiff in a later litigation under the antitrust laws as "prima facie evidence" as to "*all matters respecting which said judgment * * * would be an estoppel between the parties thereto.*" The admissibility of the judgment therefore depends upon whether it would have constituted an "estoppel by judgment" as to any material fact in this case had the Government been the plaintiff.

That the statute uses as its measuring stick the rule of estoppel by judgment rather than *res judicata* is evident not only from the language of the section but also from the fact that the judgment is to be used as "evidence",—the customary method by which estoppel by judgment or collateral estoppel is put to use. *Res judicata*, conversely, is a principle that does not come into operation through the medium of evidence but rather through pleading since it is a bar to subsequent litigation.

The congressional debates also demonstrate that by "estoppel" Congress meant collateral estoppel and not *res*

judicata. They repeatedly refer to use of the judgment as evidence of the matters "adjudicated" (51 Cong. Rec. 13853) and "evidence of the facts therein determined" (*id.*, p. 13851). The doctrine of *res judicata* applies not only to what was necessarily determined but also to what might have been proved or determined.

It should be noted that in the trial court counsel for plaintiffs agreed that "you have to determine under rules applicable to the principles of estoppel by judgment what is behind the judgment." (R. 424, 439.)

B. The Judgment in the Criminal Case Could Not Have Constituted a Determination That Plaintiffs' Franchises Were Canceled Pursuant to the Conspiracy.

It is contended in petitioners' brief that assuming Section 5 of the Clayton Act permits the use of the criminal judgment only as evidence of matters necessarily determined in that case, it is nevertheless evidence of the cancellation of plaintiff's franchises pursuant to the conspiracy since that is the effect of the judgment. Plaintiffs say this may be demonstrated by (a) reference to the opinion of the Court of Appeals in affirming the criminal judgment, (b) examination of the evidence in the criminal case, and (c) analysis of the pleadings in that case. These propositions will be answered in the above order.

(a) The Opinion in United States v. General Motors Corporation, 121 F. 2d 376, Did Not Determine Any Facts.

Plaintiffs' argument that the opinion of the Court of Appeals in *United States* v. *General Motors Corporation*, 121 F. 2d 376, established that the jury below found all of the facts discussed in that court's opinion cannot be supported on any theory. The factual recitation in the opinion relates, of course, to the question of whether there

was sufficient evidence to support the jury's verdict. The appellate court did not purport to find that the jury had found any of the facts recited. Indeed, following the recital, that court remarked, "The dealer testimony selected and described above; presents a fair picture of," not the evidence in the record, but "the dealer testimony in the record."

Not only did that court not find any question of fact, but such a finding would have been beyond the power of the court. The right of appellate review is limited "to questions of law" and "does not extend to matters of fact." *Duncan* v. *Atchison, T. & S. F. R. Co.*, 72 Fed. 808, 810; Cf. *Bond* v. *Brown*, 53 U. S. 253, 255; *Ralston Purina Co.* v. *Novak*, 111 F. 2d 631, 634; *McCann* v. *New York Stock Exchange*, 107 F. 2d 908; *Gay, Sullivan & Co.* v. *Glaser, Crandell Co.*, 102 F. 2d 149, 150; *Aetna Life Insurance Co.* v. *Ward*, 140 U. S. 76, 91.

In *Aetna Life Insurance Co.* v. *Ward, supra*, this Court said (p. 91):

> "* * * We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."

The same rule is followed in Illinois. In *The People* v. *C. & E. I. Ry. Co.*, 336 Ill. 506, the court said (p. 510):

> "* * * If any question was adjudicated in the 1925 case between the same parties which would be available in this case, it could not be shown by the opinion of this court rendered in the 1925 case, but it would have to be shown in the trial court by the record of the judgment in which the question was determined. (*People* v. *Keokuk Bridge Co.*, 295 Ill. 176.)"

(b) Estoppel Cannot Arise from the Evidence in the Criminal Case.

Plaintiffs argue that because Fred Emich testified in the criminal case that his franchises were canceled pursuant to the conspiracy and defendants there offered controverting evidence, the judgment must constitute a determination that Emich was right.

The answer to this is that the jury could have convicted defendants even though they did not believe a word of Emich's testimony. There is indication that this was the case, in that the jury acquitted everyone whom Emich sought to implicate.*

Since collateral estoppel applies only to matters necessarily determined and not to those that may have been decided, it could not arise as to matters such as the cancellation of plaintiff's franchises or the reasons for their cancellation. *Russell* v. *Place,* 94 U. S. 606, 608; *Packet Company* v. *Sickles,* 72 U. S. 580; *De Sollar* v. *Hanscome,* 158 U. S. 216; *Burden* v. *Shannon,* 99 Mass. 200, 202; *Town of Flora* v. *Indiana Service Corporation,* 222 Ind. 253, 53 N. E. (2d) 161.

(c) The General Verdict Did Not Constitute a Finding Against Defendants of All the Allegations of the Indictment.

Plaintiffs misconceive the rule applicable to general verdicts. The rule is that a general verdict is equivalent to a finding of every essential ingredient of the crime charged but not of unessential ingredients. *Massey* v. *United States,* 281 Fed. 293, 298; *Licata* v. *State,* 81 Fla. 649, 88 So. 621, 622.

The case relied on by the plaintiffs, *Chesavoir* v. *United States,* 32 F. (2d) 945, is entirely consistent with this rule. That case involved a third violation of the National Prohibition Act. The charge in the indictment of a prior con-

* Knudsen, Holler, Coyle, Hill, Moore. (R. 8553.)

viction was "a part of the description and character of the offense intended to be punished and * * * an essential ingredient of such aggravated offense." *Massey* v. *United States*, 281 F. 293, 298 (cited in the *Chesavoir* case as authority for its ruling). The jury therefore were instructed that they should inquire both as to whether the defendant had violated the act and also whether he had twice before been convicted of a violation. The general verdict of guilty was therefore the finding of all the essential ingredients of the crime charged, namely, that there had been a violation and that there had been two prior convictions. The court's statement that the jury sustained "each and all of the averments of the indictment" was merely a statement of the rule that a general verdict signifies that the jury has found "every essential ingredient of the crime charged."*

In the criminal case there was no form for a special verdict and the jury had no alternative but to return a general verdict for the defendants or for the Government. The jury was instructed that it was not necessary for the Government to prove all of the acts alleged but merely to prove a conspiracy to commit some of them. It is therefore absurd to claim—as do plaintiffs—that the general verdict constituted a finding and estoppel not only that the defend-

* Plaintiffs persist in citing *Rhoads* v. *City of Metropolis*, 144 Ill. 580, 586, notwithstanding that defendants have twice previously advised them of the overruling of this case. *The People* v. *C. & E. I. Ry. Co.*, 336 Ill. 506; *The People* v. *Wyanet Light Co.*, 306 Ill. 377. (See Reply of Appellants to Supplemental Brief of Appellees, p. 31, and Brief of Respondents in Opposition, p. 15.) Likewise the decisions in *Everett* v. *Everett*, 215 U. S. 203, and *Statler* v. *United States*, 157 U. S. 277, in no way support plaintiffs' contention. The latter case held merely that surplusage in a verdict will be disregarded and that a general verdict of guilty finds the presence of all elements essential to a conviction. The *Everett case* (an action in equity) was concerned with whether the court of one state had given full faith and credit to the decision of a court of another state. The question here involved did not and could not arise as the record of the earlier case was not complete.

ants conspired to do all of the things charged, but also that they carried out the conspiracy by committing all of the acts averred.

(d) Due to the Unique Character of the Indictment and Instructions in the Criminal Case, Nothing There Determined Was Relevant to Plaintiffs' Suit.

Not only did the criminal case fail to determine that plaintiff's franchises were terminated pursuant to the conspiracy, but it also failed to find the existence of the conspiracy upon which plaintiffs' case rests.

The indictment was not the usual type which includes the factual outline of the conspiracy in the charging clause. Rather that clause merely charged in the language of the statute that (R. 21):

> "* * * defendants and other persons and corporations to the Grand Jurors unknown, unlawfully have engaged in a conspiracy in restraint of the aforesaid trade and commerce among the several States in Cadillac, LaSalle, Buick, Oldsmobile, Pontiac and Chevrolet automobiles; and, the defendants have conspired to do all acts and things, and to use all means necessary and appropriate to make said restraint effective, including the means, acts, and things hereinafter more particularly alleged, and other means, acts, and things to the Grand Jurors unknown."

Recognizing (on demurrer) that this was insufficient as a matter of law, the trial court in the criminal case read into the accusatory paragraph the succeeding paragraphs 36 to 62. *United States* v. *General Motors Corporation*, 26 F. Supp. 353, 355.

These paragraphs, when incorporated into the accusatory paragraph, resulted in the charge of one conspiracy to do some twenty-six different things,—or one conspiracy con-

taining twenty-six terms. As an illustration, it charged a conspiracy to:

1. Grant a franchise only on condition that the dealer agrees to use GMAC (Par. 37, R. 21).
2. Withhold cars from dealers who failed to use GMAC (Par. 42, R. 22).
3. Force cars on dealers who failed to use GMAC (Par. 52, R. 23).
4. Grant special favors to dealers who used GMAC (Par. 50, R. 23).
5. Bribe employees of dealers to get them to use GMAC (Par. 47, R. 23).
6. Cancel dealers who failed to use GMAC (Par. 41, R. 22).
7. Grant special favors to GMAC (Par. 53, R. 23-24).

The Government did not offer evidence to support all of the terms.* All of the charges were controverted by defendants. This made it necessary for the court to charge the jury that the defendants could be guilty even though some of the terms were missing or even though the defendants had disproved the existence of some of them. The trial court did so charge the jury:

"And so in this case, when you come to consider the question of conspiracy to restrict interstate commerce unduly and unreasonably, it is your duty to inquire from all of the evidence and to determine from all of the evidence whether there was any contract, any agreement, any undertaking, tacit or otherwise, whereby these parties entered into acts and did acts which inevitably led to an undue restriction of interstate commerce." (R. 8535.)

"Nor is it necessary for the Government to prove all of the acts alleged. It is essential that they prove this conspiracy, and if you believe that the evidence is sufficient to sustain that conclusion, then you have a

* *E.g.*, there was no evidence to support paragraph 47 and no evidence of Cadillac or La Salle being involved in the conspiracy. (R. 23.)

right to find that there is a conspiracy, but it is not essential to that conclusion that each and every one of the acts charged in the indictment shall be proved." (R. 8536.)

Considered in the light of the interpretation which had been given the indictment on demurrer and in the light of the record before Judge Lindley, the conclusion is inescapable that this was an instruction that defendants could be found guilty even though all terms of the conspiracy except one remained unproven. Any other interpretation of the instruction would make it meaningless, as no acts were necessary for a conviction except an overt act in the Northern District of Indiana, and this requirement was covered by a separate instruction which read (R. 8543):

> "If you find that there was a conspiracy, in order to convict in this case, you must find that it existed and continued within the three-year period prior to the return of this indictment, and that some overt act was performed within this district within that time, the Northern District of Indiana, which includes South Bend and various other cities in the northern part of Indiana."

The effect of the guilty verdict in the criminal case therefore was only that the defendants had conspired to do one or more of the things charged in paragraphs 36 to 62 and that the natural effect of their agreement, whatever it included, was to restrict interstate trade unreasonably. As this was the minimum requirement for a conviction, it is the maximum that was necessarily determined in that case.

The same result follows, even assuming *arguendo* that Judge Lindley's instruction should be construed as referring only to overt acts. Since these acts were relied on as inferential evidence of the terms of the conspiracy, the instruction that not all of the alleged acts need be proven meant that not all of the terms inferable from the acts need be proven. And since the judgment determined only

that *some* of the acts had been committed, it determined only that the conspiracy included *some* of the terms.

As we do not know which of the terms were found to exist, it follows that we can not be sure that the jury found a conspiracy to withhold cars or cancel franchises. It may very well have found a conspiracy to grant franchises only on condition that GMAC be used, a situation which Emich admitted did not apply to him (R. 1225-1226). Nevertheless the judgment was not relevant to plaintiffs' case unless it determined the existence of a conspiracy to withhold cars or cancel franchises as those were the complaints of plaintiffs and their damages, if any, had to flow from such a conspiracy.

Perhaps it could be argued that if there was a conspiracy to withhold franchises pending an agreement to use GMAC, that would be of inferential value in showing also a conspiracy to cancel dealers, but this would be using the estoppel as proof of an evidentiary rather than ultimate fact, and estoppel can never be so used. *The Evergreens* v. *Nunan*, 141 F. 2d 927; *United States* v. *Five Cases, etc.*, 156 F. 2d 493, 495; *Bauer* v. *Watkins*, 171 F. 2d 492, 494; *Travelers Ins. Co.* v. *Commissioner of Internal Revenue*, 161 F. 2d 93, 96; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 928. The rule is clearly stated in the Restatement of the Law—Judgments, Title E, Effect on Other Causes of Action-Collateral Estoppel (Sec. 68, subd. p.). Furthermore, that was not the use made of the judgment. In the civil case the jury was not instructed regarding the niceties of such a proposition but rather by both the court (R. 7439-7440) and by plaintiffs' counsel (R. 7069-7073) were told that defendants had already been found guilty of a conspiracy to cancel and indeed of the actual cancellation of the franchises.

It might also be argued that since the terms of the conspiracy pertinent to plaintiffs' case (conspiracy to withhold

cars and cancel dealers) was charged and some evidence received to support the charge, the criminal jury may have based their verdict on those very terms. This is true but it does not advance plaintiffs' cause as estoppel by judgment applies only as to a matter *necessarily* and not *possibly* determined. *Russell* v. *Place*, 94 U. S. 606, 608; *Packet Company* v. *Sickles*, 72 U. S. 580; *De Sollar* v. *Hanscome*, 158 U. S. 216; *Burlen* v. *Shannon*, 99 Mass. 200, 202; *Town of Flora* v. *Indiana Service Corporation*, 222 Ind. 253, 53 N. E. 2d 161.

The conclusion must therefore follow that the criminal judgment is not only inadmissible to show the impact of the conspiracy upon plaintiffs but it is not admissible for any purpose.

Such a conclusion may at first blush offend since it might seem to nullify Section 5 of the Clayton Act. Perhaps it was this reaction that impelled the Court of Appeals to hold that the judgment was admissible to show a conspiracy to restrain the commerce of dealers although not the impact upon plaintiffs. However, there need be no such concern as it is the peculiarities of this particular case and not the statute that creates this result. In the normal case of price fixing or of allocating customers or of monopolizing,* or of a conspiracy containing one term, there would be no uncertainty and estoppel would apply. Likewise a special verdict might have avoided the ambiguity.

Indeed, in every one of a total of 110 indictments filed by the Department of Justice during the years 1939 through 1948 which were available for examination by defendants, the accusatory section was not in the language of the statute but alleged a specific type of restraint and the further allegations of terms were merely a particulariza-

* The indictment charged only a violation of Section 1 of the Sherman Act and the Government expressly disclaimed an intent to charge a conspiracy to monopolize financing. (Cr. R. 4607.)

tion of the specific offense (see Appendix to Reply of Appellants to Supplemental Brief of Appellees).*

The result in the instant case follows solely from the peculiarities of the criminal case and in no way deals "the antitrust laws a severe blow" (Br. for Petnrs., p. 13) or any blow whatsoever.

(e) The Ruling of the Court of Appeals Is Not in Conflict With Local 167 v. United States, 291 U. S. 293.

Plaintiffs' reliance upon the case of *Local 167* v. *United States*, 291 U. S. 293, is based upon the following assumptions:

I. That the indictment was similar to the South Bend indictment.
II. That the instructions were likewise similar.
III. That this Court held that defendants were estopped from denying everything alleged in the indictment.

All three assumptions are erroneous and the supposed issue for which plaintiffs cite the case was not even before the Court. The indictment in that case was conventional rather than the unique form used in the South Bend case. It alleged in the terms of a factual conspiracy an agreement "intended to * * * prevent, hinder and restrict" certain persons from "purchasing, selling and shipping" live and freshly slaughtered poultry. After the detailed statement of the terms of the conspiracy, there were alleged twenty different "means and methods" which had been employed

* It may be that the unusual form of the indictment in the South Bend case resulted from the fact that the case presented the unusual situation of a charge of a conspiracy lawful in purpose which was illegal because carried out by unlawful means. In other words, the object of the conspiracy, for GMC to sell its financing facilities, was perfectly lawful; it was the unlawful means used which took the agreement out of the area of legality. Most conspiracies under the antitrust laws are illegal because they are unlawful in purpose regardless of whether or not lawful means have been used to effectuate them.

by the defendants in the carrying out of the conspiracy. Those "means and methods" were not the terms of the conspiracy and it was not necessary that they be proved. Thus the court there instructed the jury:

> "My attention has been called to one matter—that it is not necessary in order to find a verdict here that every detail of the charge that is made in the indictment should be found in order to return a verdict. You should, however, find, in order to return a verdict, that of the things that are alleged against the defendants, that what they did in that regard unreasonably and directly restrained interstate commerce in this poultry. It is not necessary to find every last word that is in the indictment in that respect; if you find that there was interstate commerce, that there was an unlawful agreement and that there was an unreasonable restraint, however, it might have been brought about if one or more of the plans in the indictment actually took place."

In addition to the language of the instruction it is evident from a consideration of the indictment that in saying that the restraint might "have been brought about if one or more of the plans in the indictment actually took place" the court was referring to "means and methods" and not to the terms of the conspiracy. In the South Bend case the instruction had to refer to the terms as there were no terms stated except in paragraphs 36 to 62, which paragraphs in the conventional indictment might have been merely "means and methods."

In the subsequent equity suit the defendants who had been defendants in the criminal case were estopped from denying the conspiracy. The allegations of the "means and methods" in the equity suit, were, however, of importance only with respect to the conduct of the defendants following their conviction. The issue before the District Court in the equity case when it struck portions of

the answers of defendants is succinctly stated in the Government's brief (pp. 48, 49) before this Court:

> "The District Court, by looking at its own records, ascertained that certain defendants had been adjudicated guilty of the conspiracy charged in the amended petition. The denial of this adjudicated fact was a sham and the proper remedy was a motion to strike the denial.
>
> • • • • •
>
> "The District Court struck out the convicted defendants' denial of the allegations of the petition setting forth the means and methods used in effecting the conspiracy, not upon the ground that the facts therein alleged had been adjudicated against them, but upon the ground that the only allegations of the petition material as to these defendants were those setting forth continuance of the conspiracy after August 20, 1928. The District Court did not strike out the convicted defendants' denial of the latter allegations.
>
> "In any event, the convicted defendants were not prejudiced by the action of the District Court in striking a portion of their answers. The conspiracy was independently established as against the nonconvicted defendants. The Government concedes that the court, in framing a decree, must look solely to the proof in this cause and to the inferences properly to be drawn therefrom. The District Court's ruling did not bar the convicted defendants from introducing evidence to controvert that offered by the Government upon any issue material as to them, and at the trial no evidence was in fact excluded upon the ground that it was barred by the court's ruling."

This Court's opinion in *Local 167* v. *United States*, 291 U. S. 293, in the light of this presentation of the problem by the Government, merely states the basic rule of estoppel. This Court said (*Local 167* v. *United States*, 291 U. S. 293, 298):

> "The judgment in the criminal case conclusively established in favor of the United States and against

those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. And to the extent that the answers attempt to deny participation of convicted defendants in the conspiracy of which they had been found guilty, they are false and sham, and the District Court rightly so treated them."

The issue presented in the instant case was not before this Court in *Local 167* v. *United States*, 291 U. S. 293, and this Court neither determined nor stated any rule of law inconsistent with the prior pronouncements as to the limits of estoppel by judgment nor any rule inconsistent with the position taken by defendants.

(f) The Ruling of the Court of Appeals Is Not Inconsistent With Bigelow v. R. K. O. Pictures, 162 F. 2d 520.

After the discussion of the *Local 167 case*, plaintiffs seek to draw comfort out of the second *Bigelow case*, reported in 162 F. 2d 520.

It is obvious that this decision did not involve the doctrine of estoppel by judgment.

We quote from the opinion (p. 522):

"The original complaint stated but one cause of action which, if proved, entitled the plaintiffs to two kinds of relief, namely, damages and an injunction. The same judge that presided in the trial of the damage action heard the plaintiffs' application for an injunction. One phase of this complaint was submitted to the jury which returned its verdict for damages, upon which judgment was entered and finally affirmed by the Supreme Court. The other phase was tried by the presiding judge as a chancellor, who has stated his findings of fact and conclusions of law and upon

them entered the decree from which the defendants have appealed."

And again (p. 523):

"We put to one side the refinements of argument, orally and in the briefs, as to the distinction between estoppel by verdict and estoppel by judgment, and look to all the evidence in this case that was submitted to the trial court on the first hearing, in order to determine whether there is evidence to sustain the findings that the court actually made."

There was no first suit and second suit, such as is necessary for estoppel by judgment, but two phases of the same suit. The evidence taken in the first phase was part of the record available for consideration upon the second phase of the same suit.

The decision in the instant case was in no way in conflict with the *Bigelow* case. They dealt with entirely different problems.

III.

THE COURT OF APPEALS WAS CORRECT IN FINDING ERROR IN THE USE OF THE INDICTMENT.

A. It Was Error to Submit the Indictment to the Jury.

Counsel for plaintiffs advance five reasons for the submission of the indictment to the jury, namely:

1. That it was proof that the conspiracy in the criminal case was identical with that in the instant case.

2. That the jury needed the indictment in order to determine what weight should be given the judgment.

3. That the indictment was a part of the judgment.

4. That the exclusion of the indictment would frustrate public policy.

5. That the statute authorizes submission of the indictment to the jury.

None of these reasons is compelling or sound.

The indictment was not evidence of the identity of the conspiracies.

In the civil case it was for the court and not the jury to determine what conspiracy was found by the jury in the criminal case. The authorities relied upon by plaintiffs (Br. for Petnrs., p. 38) relate to the situation, nonexistent here, where extrinsic evidence *dehors* the record of the prior litigation must be resorted to in determining the scope of that litigation. Only in such cases is the extrinsic evidence for the jury. Otherwise the general rule that the effect of a judgment is a question of law for the court obtains. 30 Am. Jur. (Judgments), Sec. 275, page 994; 2 Black on Judgments (2d ed.), Sec. 631; 2 Freeman on Judgments, Sec. 767.

Since the description, nature, and limitations of the conspiracy in the criminal case were matters for the court in the civil case to determine and pronounce, there was nothing in the criminal record (save the judgment) to go to the civil jury. Plaintiffs might presumably have offered extrinsic evidence to show that the criminal conspiracy was the same as that relied upon by plaintiffs and such evidence would have been for the jury, but it could not be extrinsic evidence if it was the indictment or any other part of the criminal record.

Indeed the pleadings and evidence in the criminal case were in effect merged in the judgment and could have no evidentiary value in addition to or separate from that judgment as interpreted by the judge in the civil case.

The indictment could not aid the jury in determining the weight to be given the judgment.

Plaintiffs complain that the jury cannot determine the

weight to be given the criminal judgment unless they also have the indictment. It is difficult to understand how an indictment, which charges everything the drafter can think of,* could aid a jury in determining the weight to be given, not the charge, but the finding of the jury after hearing the evidence. In any event Congress has made only the judgment admissible and has provided that it shall be given only the weight of prima facie evidence, that is, evidence which at first blush may seem persuasive.

The indictment was not admissible as a part of the judgment.

While it is true that pleadings and evidence are always merged in a judgment, that does not mean that the judgment should be interpreted as finding the existence of everything charged or as incorporating all of the charges. Even the trial court in the instant case recognized that this was not the case (R. 9098, 9101). Under these circumstances it could only be confusing and misleading to submit the indictment to the jury.

The exclusion of the indictment does not frustrate public policy.

Plaintiffs complain that unless the indictment is admitted they will be unable to argue to the jury that the conspiracy was something other than "as delimited by the court below".

This is precisely why the indictment should not be admitted. Since the effect to be given the judgment is a matter of law for the court's pronouncement, neither counsel nor the jury should be permitted to speculate over its having some further or other effect.

Nor can it be said that this is against public policy when it is the policy of the statute as adopted by Congress. Had

* In the criminal case no evidence was offered to support certain of the charges, *e.g.*, commercial bribery (par. 47, R. 23) and participation by Cadillac.

Congress desired to have the entire criminal record go to the jury and to have the effect to be given the criminal judgment determined by the jury, it presumably would have so stated.

The statute does not authorize the submission of the indictment to the jury.

Plaintiffs' argument under this point is substantially a reiteration of their arguments made under other points. The authority which they cite (*Hornbuckle* v. *Stafford*, 111 U. S. 389, 391, 393) was an equitable action which merely announced the basic proposition that all parts of a record may be examined by the court in order to ascertain what matters were determined in that proceeding.

B. The Court of Appeals Did Not Misinterpret the Trial Court's Instructions Regarding the Indictment.*

The opinion expressly observes that while the trial court originally held only the judgment admissible and that it was for the court to instruct the jury as to the effect of the judgment, it later failed to conform to its own ruling (R. 9454-9455).

Ultimately the indictment went to the jury with the admonition that the criminal jury had not necessarily found all of the charges to be proven, but without any guide as to what was not proven and with an instruction that the judgment constituted proof of the cancellation of plaintiff's franchises pursuant to the conspiracy (R. 7439). This confusion coupled with the argument of plaintiffs' counsel that all of the charges had been found true (R. 7069-7073) could not have been other than prejudicial.

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* The inclusion of this point in the Brief for Petitioners (pp. 41-42) seems to be outside the scope of the grant of certiorari which was limited to "the question whether the Court of Appeals erred in construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment," etc.

C. The Criminal Judgment Was Not Evidence of the Existence of All the Matters Charged in the Indictment.

Plaintiffs' final proposition in support of the submission of the indictment to the jury is that the judgment was proof of all matters charged in the indictment and that it was therefore proper to use the indictment as a short cut for advising the civil jury as to the effect of the criminal judgment.

The effect to be given the criminal judgment has been discussed and will not here be repeated. Since the conviction did not determine everything charged in the indictment, it follows that it was error to create the reverse impression by submitting the indictment to the jury.

IV.

UNDER THE DOCTRINE OF RES JUDICATA, AND INDEPENDENT OF SECTION 5, RESPONDENTS ARE NOT ESTOPPED FROM DENYING THE CONSPIRACY OR ITS SUPPOSED IMPACT UPON PETITIONERS.*

For the first time in this litigation plaintiffs now argue that independent of Section 5 of the Clayton Act, defendants are conclusively estopped from litigating the existence of the conspiracy or its impact. No such contention was made in the trial court, the Court of Appeals, or on the application for certiorari.

This contention of plaintiffs that the only open issue in the civil action is the issue of damages collides with the two fundamental requirements for the application of the doctrine of *res judicata*, namely, (a) that the two causes of action be identical and (b) that the parties be the same.

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* Plaintiffs' discussion under this point is also outside the grant of certiorari which is limited to the construction of Section 5 of the Clayton Act.

The criminal case dealt with the invasion of a public right,—the right of the public to be free of conspiracies in restraint of trade, whether that restraint be the result of the granting of special favors to GMAC (R. 23-24), the granting of franchises only on condition that GMAC be used (R. 21) or the cancellation of franchises for failure to use GMAC (R. 22). The jury there found that defendants had conspired to do one or more of the things charged and that it resulted in a restraint in one or more of the forms charged.

Here plaintiffs sue for the invasion of a private right,—the right not to have its business or property injured pursuant to a conspiracy in restraint of trade, but only a conspiracy that restrained by withholding cars or canceling franchises. In this case the jury might find a conspiracy but not one involving such restraints, or it might find a conspiracy involving such restraints and still find that plaintiff's franchises were not cancelled pursuant to the conspiracy.* As to these issues, there has been no determination and *a fortiori,* as to them, defendants have not had their day in court.

If the contention of plaintiffs were correct, there would be no occasion for having Section 5 of the Clayton Act. Indeed that section does not go as far as plaintiffs contend the law does without the statute as the latter makes the criminal judgment only "prima facie" evidence.

That Congress did not accept plaintiffs' version of the law is evidenced not only by the enactment of the statute but also by their debates regarding it. The following quotations are illustrative:

Senator Reed (51 Cong. Rec. 13901):

"What is meant by your day in court? I think that

* One of the grounds on which the Court of Appeals reversed the judgment below was the trial court's systematic exclusion of evidence as to the actual reasons for the cancellation of plaintiffs' franchises.

when a court comes to consider the question of whether a litigant has had his day in court the court is likely to take the position that that expression has a pretty well defined meaning in the law, and that it means in the case where the judgment is about to be rendered that the litigant must be entitled to his full right to put in his evidence and take the judgment of a court or jury upon the facts thus presented in that particular case."

Senator Chilton (51 Cong. Rec. 13853):

"But, Mr. President, in our zeal to do something for the people and to get legislation which has 'teeth in it' we must remember that every person under the Constitution of the United States has rights. One of the fundamental rights of every person and every corporation in the United States is that he must have a day in court on his own case and on his facts.

* * * * *

"I need not reiterate that the Committee on the Judiciary, without a single exception, was desirous of enacting a statute with teeth in it, as the expression is commonly used, one that would accomplish some good and would not merely play with this great subject; but when we came to investigate the question of the extent to which we could go a majority of that committee reached the conclusion that we could not go further than to make judgments or decrees rendered in a prior suit between other parties prima facie evidence. What does prima facie evidence mean? It means evidence sufficient to make out a case and to entitle one to recover unless overcome by proof. In other words A recovers judgment against B, then, in a suit brought by C against B, the former judgment that B has violated the law will entitle C to recover until and unless B shall overcome the prima facie case by competent evidence; and even then C is not precluded from introducing other evidence to support the prima facie case. It is an immense advantage for one to begin a law suit with sufficient evidence to entitle him to win; and that far we can go in safety."

Senator Walsh (51 Cong. Rec. 13851):

"The amendment proposed by the Senate Committee, however, simply makes that judgment prima facie evidence, so that when the individual citizen, claiming to be damnified by reason of the organization thus adjudged to be in violation of law brings his action to recover damages, he may submit in evidence the judgment and then prove his damages; but, although that will make a case for him, the organization still has a right to submit other evidence, to have a further trial upon the matter, and eventually get a judgment overturning, if he can, the judgment that was rendered in the action brought by the United States Government."

(51 Cong. Rec. 16149):

"Under the bill as it left the Senate one suing a corporation adjudged to exist in violation of the Sherman Act or to be guilty of practices denounced by it, may introduce the judgment pronounced against it; not the testimony, but the judgment. The defendant is then at liberty to introduce its evidence. It may call the same witnesses or it may call witnesses other than those used in the Government's suit. The plaintiff may then introduce his proof, if, indeed, he is not required, at the risk of being shut out altogether, to supplement his prima facie case in the first instance by such evidence as he can command. But he must call the witnesses; he cannot introduce the evidence taken in the Government case. Then the whole matter is submitted upon the new as well as the old evidence to the court or jury, deciding on which is the preponderance prevailing."

Perhaps plaintiffs will retreat by saying that their proposition applies only where the plaintiff in the civil action was a witness in the criminal suit. However, their argument of necessity goes beyond this and is based upon the fact that respondents were the defendants in both cases and that the issues were the same. Furthermore, if the doctrine of *res judicata* applies, it is conclusive as to all matters that

might have been determined regardless of whether they were, and presumably any other potential civil plaintiff might have been a witness and therefore the adjudication would apply in his favor.

It is submitted that plaintiffs' argument not only offends the basic principles of the doctrine of *res judicata* but would result in a nullification of the statute.

It is respectfully submitted that the Court of Appeals did not err in construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation.

Respectfully submitted,

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